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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 WILBUR LANN PITTMAN,  
12 Petitioner,  
13 v.  
14 D. PEARSON, et al.,  
15 Respondent.

Civil No. 09-0301 L (RBB)

**ORDER GRANTING APPLICATION  
TO PROCEED IN FORMA  
PAUPERIS AND DISMISSING CASE  
WITHOUT PREJUDICE**

16 Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas  
17 Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

18 **REQUEST TO PROCEED IN FORMA PAUPERIS**

19 According to his prison trust account statement, Petitioner has no funds on account at the  
20 California correctional institution in which he is presently confined. Petitioner cannot afford the  
21 \$5.00 filing fee. Thus, the Court **GRANTS** Petitioner's application to proceed in forma  
22 pauperis, and allows Petitioner to prosecute the above-referenced action without being required  
23 to prepay fees or costs and without being required to post security. The Clerk of the Court shall  
24 file the Petition for Writ of Habeas Corpus without prepayment of the filing fee.

25 **FAILURE TO NAME A PROPER RESPONDENT**

26 Review of the Petition reveals that Petitioner has failed to name a proper respondent. On  
27 federal habeas, a state prisoner must name the state officer having custody of him as the  
28 respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28

1 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to  
2 name a proper respondent. *See id.*

3 The warden is the typical respondent. However, “the rules following section 2254 do not  
4 specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the  
5 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal  
6 institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a  
7 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall  
8 be the state officer who has official custody of the petitioner (for example, the warden of the  
9 prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

10 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]  
11 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
12 actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v.*  
13 *Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of  
14 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the  
15 body” if directed to do so by the Court. “Both the warden of a California prison and the Director  
16 of Corrections for California have the power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d  
17 at 895.

18 Here, Petitioner has incorrectly named “D. Pearson” and “J. Harris” as Respondents. In  
19 order for this Court to entertain the Petition filed in this action, Petitioner must name the warden  
20 in charge of the state correctional facility in which Petitioner is presently confined or the  
21 Secretary of the California Department of Corrections and Rehabilitation. *Brittingham v. United*  
22 *States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

### 23 **FAILURE TO STATE A COGNIZABLE HABEAS CLAIM**

24 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner  
25 has failed to allege that his state court conviction or sentence violates the Constitution of the  
26 United States. Title 28, United States Code, § 2254(a), sets forth the following scope of review  
27 for federal habeas corpus claims:

28 The Supreme Court, a Justice thereof, a circuit judge, or a district  
court shall entertain an application for a writ of habeas corpus in

1           behalf of a person in custody pursuant to the judgment of a State  
 2           court only on the ground that he is in custody in violation of the  
              Constitution or laws or treaties of the United States.

3   28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.  
 4   1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800  
 5   F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim  
 6   under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of  
 7   a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the  
 8   United States.” *See* 28 U.S.C. § 2254(a).

9           Here, Petitioner’s allegations are incomprehensible. He appears to claim that correctional  
 10   staff members have violated various provisions of the California Penal Code. (*See* Pet. at 6-9.)  
 11   In no way does Petitioner claim he is “in custody in violation of the Constitution or laws or  
 12   treaties of the United States.” 28 U.S.C. § 2254. Accordingly, the Petition must be dismissed.

### 13           **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

14   Further, habeas petitioners who wish to challenge either their state court conviction or the length  
 15   of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
 16   § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
 17   remedies, a California state prisoner must present the California Supreme Court with a fair  
 18   opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
 19   U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
 20   remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
 21   have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned:  
 22   “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
 23   rights, they must surely be alerted to the fact that the prisoners are asserting claims under the  
 24   United States Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas  
 25   petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
 26   due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
 27   in federal court, but in state court.” *Id.* at 366 (emphasis added).

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1        Nowhere on the Petition does Petitioner allege that he raised his claims in the California  
 2        Supreme Court. In fact, he specifically indicates he did not seek review in the California  
 3        Supreme Court. (*See* Pet. at 6-8.) If Petitioner has raised his claims in the California Supreme  
 4        Court he must so specify. “The burden of proving that a claim has been exhausted lies with the  
 5        petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *see Breard v. Pruett*, 134 F.3d  
 6        615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v.*  
 7        *Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

8        Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 9        Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
 10       of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
 11       limitation period shall run from the latest of:

12                    (A) the date on which the judgment became final by the  
 13                    conclusion of direct review or the expiration of the time for seeking  
 14                    such review;

15                    (B) the date on which the impediment to filing an application  
 16                    created by State action in violation of the Constitution or laws of the  
 17                    United States is removed, if the applicant was prevented from filing  
 18                    by such State action;

19                    (C) the date on which the constitutional right asserted was  
 20                    initially recognized by the Supreme Court, if the right has been  
 21                    newly recognized by the Supreme Court and made retroactively  
 22                    applicable to cases on collateral review; or

23                    (D) the date on which the factual predicate of the claim or  
 24                    claims presented could have been discovered through the exercise  
 25                    of due diligence.

26        28 U.S.C. § 2244(d)(1)(A)-(D).

27        The statute of limitations does not run while a properly filed state habeas corpus petition  
 28        is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).  
*But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

1 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
2 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
3 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
4 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
5 habeas relief because he has not alleged exhaustion of state court remedies.

#### 6 CONCLUSION

7 Based on the foregoing, Petitioner’s application to proceed in forma pauperis is  
8 **GRANTED**. However, the Petition is **DISMISSED** without prejudice for failure to name a  
9 proper respondent, failure to state a cognizable claim, and failure to allege exhaustion of state  
10 judicial remedies. In order to have this case reopened, Petitioner must, **no later than May 1,**  
11 **2009**, submit a First Amended Petition which cures the pleading deficiencies discussed in this  
12 Order. *For Petitioner’s convenience, the Clerk of Court shall attach to this Order a blank First*  
13 *Amended Petition form.*

14 **IT IS SO ORDERED.**

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16 DATED: March 10, 2009

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18 M. James Lorenz  
19 United States District Court Judge  
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